

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Commission's Program Access	)	MB Docket No. 07-198
Rules and Examination of Programming	)	
Tying Arrangements	)	
	)	

**REPLY COMMENTS OF  
THE COALITION FOR COMPETITIVE ACCESS TO CONTENT (CA2C)**

**CA2C Members Represented in these Reply Comments Include: AT&T Inc., Broadband Service Providers Association (BSPA), DIRECTV, Inc., Embarq, Hiawatha Broadband, Independent Telephone and Telecommunications Alliance (ITTA), Knology/PrairieWave, Media Access Project (MAP), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), RCN, SureWest, USTelecom, WOW! Internet, Cable and Phone.**

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Dated: February 12, 2008

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The Coalition for Competitive Access to Content ("CA2C") hereby submits these reply comments in the above-captioned proceeding.<sup>1</sup> In the *Notice*, the Federal Communications Commission ("Commission" or "FCC") seeks comment on, *inter alia*, whether the program access rules should be extended to terrestrially-delivered cable-affiliated programming in order to preserve and protect competition and diversity in the distribution of video programming. The Commission also seeks comment on whether it should provide for the early sunset of the prohibition on exclusive contracts contained in Section 628(c)(2)(D).

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<sup>1</sup> *Matter of Review of the Commissions, Program Access Rules and Examination of Programming Tying Arrangements*, NPRM, 22 FCC Rcd 17791 (2007) ("Notice").

## **INTRODUCTION AND SUMMARY**

The commenters in this proceeding that support closing the terrestrial loophole also supported the recent five-year extension of the prohibition against exclusive contracts for satellite-delivered, cable-affiliated programming for five years. The Commission fully endorsed the continuing need for access to “must have” programming when it recently made the unanimous and correct decision to extend the prohibitions on exclusive contracts for an additional five years.<sup>2</sup> The Commission also correctly recognized the documented harm that denied access to terrestrially-delivered content has already had in the marketplace, and that examples of denied access to content, where access is not protected, constitutes clear evidence of what would occur regularly absent such prohibitions on exclusive contracts.<sup>3</sup> All of the arguments related to the essential competitive need for assured access to satellite-delivered cable-affiliated programming apply equally to terrestrially-delivered cable-affiliated programming. The CA2C thus urges the Commission to exercise its authority under Section 628(b) of the Communications Act of 1934, as amended,<sup>4</sup> and Section 706 of the Telecommunications Act of 1996,<sup>5</sup> and apply the program access rules to terrestrially-delivered, cable-affiliated programming.

Opponents to such application argue that the market is “intensely competitive,” and that assured access to programming is not essential to preserve and protect competition and diversity. These positions are predictable, add nothing new, and are no more persuasive in this proceeding

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<sup>2</sup> See *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution; Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, 17792 (2007) (“2007 Sunset Extension Order”).

<sup>3</sup> *Id.* at 17817-818.

<sup>4</sup> 47 U.S.C. § 548(b).

<sup>5</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 157 nt.

than they were when used to argue against the recent extension of the exclusivity prohibition. Congress, the Commission, and all other parties filing in this proceeding are committed to preserving, protecting, and developing competition and diversity. The current program access provisions have clearly contributed to these objectives and should now be expanded to include terrestrially-delivered, cable-affiliated programming.

1. Comcast, Cablevision, and NCTA all continue to assert that the current multichannel video programming distribution (“MVPD”) market is “intensely competitive” primarily due to the growth of the DBS sector. These arguments have no more merit in this proceeding than they had in the recent proceeding to extend the current prohibitions on exclusive contracts.
2. There is no question that the exclusivity prohibition has successfully supported the development of competition in the market, and that denied access to terrestrially-delivered content has also harmed competition.
3. There is no evidence that the current prohibition on discrimination and exclusive contracts has harmed the development of programming, and there is also no expectation that a similar prohibition on cable-affiliated terrestrially-delivered programming would harm the development of programming.
4. Commenters that oppose closing the terrestrial loophole have also asserted incorrectly that: (i) it was the “intent of Congress” to limit the prohibitions on exclusives to satellite-delivered content and (ii) despite the fact that the Commission has implemented merger conditions that prohibited exclusive contracts for terrestrially-delivered programming subject to those proceedings, the Commission does not have rulemaking authority to take such action. Neither of these assertions is correct. Section 628(b) gives the Commission

ample authority to create additional rules that are needed to preserve and protect competition. Moreover, the First Amendment arguments raised by these commenters have already been rejected by the Commission and the courts and do not affect the Commission's authority to adopt new rules closing the terrestrial loophole.

6. In addition, contrary to the assertions of Comcast, Cablevision and NCTA, Section 706(a) of the Telecommunications Act of 1996 also buttresses the Commission's authority to act to close the terrestrial loophole under Section 628. Where, as here, it has discretion to regulate under the Communications Act, the Commission has routinely looked to Section 706's command to promote broadband deployment to inform the exercise of such discretion. Moreover, as the Commission has repeatedly recognized, broadband deployment is "linked intrinsically" to the ability to offer a viable video service, and video policies must be viewed in the context of what impact those policies will also have in achieving broadband development.
7. Comcast, Cablevision and NCTA also point to the current success of DBS competition as evidence that competition has and can succeed without access to terrestrially-delivered content. In making this claim they ignore the documented harm that this denial has on DBS competition in markets where significant terrestrially-delivered content continues to be denied.
8. Comcast and Cablevision have also requested amendments to the rules that would allow for the early sunset of the prohibitions on exclusive contracts in markets where competition has supposedly been established. As proposed, this would sunset the ban in nearly all markets – thus undoing the Commission's recent extension of the exclusivity prohibition. And even if such proposals could be limited, they would allow for relaxation

of the rule in precisely those markets where the incentive and ability of incumbent cable operators to do competitive harm are greatest, raising serious competitive concerns.

Rules that have been historically suggested by these advocates for an early sunset have already been rejected. New suggestions like the 50/15 “effective competition” test used for determining when basic service can no longer be subject to local rate regulation should also be rejected.

## **DISCUSSION**

### **I. THE MVPD MARKET REMAINS DEMONSTRABLY DOMINATED BY VERTICALLY INTEGRATED CABLE, NECESSITATING CONTINUED AND EXPANDED PROGRAM ACCESS RULES.**

Just months ago, the Commission found a continued, and indeed renewed, importance of policies that both sustain current levels of competition and foster additional competition to incumbent cable operators. Yet Comcast, Cablevision, Time Warner and their primary trade Association, NCTA, all argue – again – that the growth and market position of DBS services, DIRECTV and Dish Network, are primary reasons that the MVPD market should be viewed as sufficiently competitive to warrant sunset of the prohibitions on exclusive contracts. These arguments are as misguided now as they were the first time around.

The further comments of Comcast and NCTA to the effect that the MVPD market is “intensely competitive,”<sup>6</sup> seek to obscure the stark reality that, in markets around the country, particularly in the emerging regional clusters that they have been assembling over the past five years, major cable operators dominate. Such regional market shares can range from 65% to 90% share of MVPD subscribers, with sustained price increases at nearly 3 times the rate of inflation.

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<sup>6</sup> Comments of NCTA at 3 (filed Jan. 4, 2008); Comments of Comcast Corp. at 1-2 (filed Jan. 4, 2008).

As the Commission concluded in the *2007 Sunset Extension Order*, regional market shares that are significantly higher than the national average create additional incentives to withhold programming.<sup>7</sup> These regional clusters also create a more significant opportunity to use terrestrially-delivered regional programming that has unique value to a specific regional market, to thwart competition:

Moreover, because the share of MVPD subscribers held by cable operators is above or near 78 percent in many DMAs, there is no reduction in potential subscribership or viewership in many regional areas from that which we observed in the *2002 Extension Order*. . . . Thus, particularly where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy. In the long term, a withholding strategy may result in a reduction in competition in the video distribution market, thereby allowing the affiliated cable operator to raise rates.<sup>8</sup>

Moreover, cable-affiliated programmers can employ “cable only” exclusives to take advantage of cable’s aggregate, national market power. In such circumstances, the presence of DBS operators and wireline competitors (which today reach 5- 6 % of the MVPD market)<sup>9</sup> are insufficient to warrant what would be tantamount to complete elimination of the program access rules.

The Commission, as it has rightfully done, must continue to pursue policies that create conditions to support existing and expanded competition to vertically-integrated cable operators. Preventing the major cable industry from using its control over programming, in this case through exclusive contracts and other discriminatory conduct involving terrestrially-delivered programming, is crucial for competition in the industry. For this reason alone, the protections of

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<sup>7</sup> *2007 Sunset Extension Order*, 22 FCC Rcd at 17810.

<sup>8</sup> *Id.* at 17828-829 (internal citations omitted).

<sup>9</sup> The most recent Cable Competition Report has not yet been released. However, we believe that this is a fair estimate of the current penetration of wireline competition.

the program access rules should now be extended to include cable-affiliated terrestrially-delivered programming.

**II. THE COMMISSION HAS CLEAR LEGAL AUTHORITY TO CLOSE THE TERRESTRIAL LOOPHOLE, AND THERE ARE NO LEGAL IMPEDIMENTS TO IT DOING SO.**

**A. The Commission has Clear Legal Authority to Close the Terrestrial Loophole.**

Comcast, Cablevision and NCTA argue that the plain language of Section 628 limits its reach to programming that is delivered by satellite, and that the Commission has so ruled on multiple occasions.<sup>10</sup> The Commission has typically addressed refusals to deal involving terrestrially-delivered programming within the context of specific program access complaints, rather than in a rulemaking context where the Commission fully addressed and vetted the scope of its authority under Section 628. Each of those program access complaint proceedings has principally involved the specific prohibitions promulgated by the Commission under Section 628(c)(2) (specifying the “*minimum* content of regulations” promulgated under Section 628), which of course are limited to satellite delivered programming.<sup>11</sup>

In the two principal rulemaking decisions discussed by Comcast, Cablevision and NCTA, the *2002 Sunset Extension Order*,<sup>12</sup> and the *2007 Sunset Extension Order*, the Commission

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<sup>10</sup> See Comments of Comcast Corp. at 6-7, 11-12; Comments of Cablevision Sys. Corp. at 14-16 (filed Jan. 4, 2008); Comments of NCTA at 12-13.

<sup>11</sup> See, e.g., *RCN Telecom Serv. of N.Y., Inc. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048, 12049-050 (2001); *DIRECTV Inc. v. Comcast Corp.*, 13 FCC Rcd 21822 (1998), *aff'd*, 15 FCC Rcd 22802 (2000); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089, (1999), *aff'd*, 15 FCC Rcd 22802, *aff'd*, *EchoStar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *Everest Midwest Licensee v. Kansas City Cable Partners*, 18 FCC Rcd 26679 (2004).

<sup>12</sup> *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 (2002)(“2002 Sunset Extension Order”).

discussed, to a limited extent in a rulemaking context, the scope of one provision of Section 628. In the *2007 Sunset Extension Order*, in declining to extend the exclusivity provision to terrestrially-delivered programming, the Commission confined its analysis to Section 628(c)(2)(D), the exclusivity prohibition in the “minimum contents of regulations,” noting that the plain language of the provision and the provision’s legislative history (citing, without further analysis, the *2002 Sunset Extension Order*), “place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D).”<sup>13</sup>

However, as CA2C discussed in its initial comments, the Commission did not focus on the scope of Section 628(b) and its interplay with Section 628(c)(2), which specifies the “minimum contents of regulations” under Section 628(b), not the scope of that section. In particular, Section 628(c)(1) directs the Commission to prescribe regulations specifying the particular conduct that is prohibited by Section 628(b) “in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies.” Subsection 628(c)(2), specifies only the “*minimum contents*” of such regulations (emphasis added).

Although the Commission previously limited its rules promulgated under these sections to satellite delivered programming, including the exclusivity regulations adopted in line with Section 628(c)(2)(D), the Commission has recognized that the “minimum contents of regulations” contained in Section 628(c)(2) should *not* be viewed as an expression of the limits of the Commission’s jurisdiction under Section 628, but as a starting point, the base case, for

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<sup>13</sup> *2007 Sunset Extension Order*, 22 FCC Rcd at 17845.

those regulations.<sup>14</sup> It is Comcast, not CA2C, that seeks to “rewrite Section 628(c)(2)(D)” by casting that section as a constraint on, rather than the starting point for, Commission authority.<sup>15</sup>

On its face, Section 628(b), which makes it unlawful for a cable operator or a vertically integrated satellite cable programming vendor to “engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming . . . to subscribers or consumers,” does not limit the “unfair methods of competition or unfair or deceptive acts or practices” within its ambit to conduct involving satellite-delivered programming. To the contrary, the provision is silent as to the particular conduct that might constitute unfair methods of competition or unfair or deceptive acts or practices. As the Commission rightly found in its *MDU Exclusivity Report and Order*, conduct that may not be directly related to programming can form the basis of a potential violation of Section 628(b) if the purpose or effect of such conduct is to hinder significantly an MVPD from providing satellite programming.<sup>16</sup> The Commission thus unquestionably has authority under section 628(b) to adopt rules to preclude

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<sup>14</sup> See *Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and FNPRM, 22 FCC Rcd 20235, 20258-260 (2007)(“*MDU Exclusivity Report and Order*”); *Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, 18320 (1996)(“*Second OVS Report and Order*”)(citations omitted)(Section 628(b) authorizes the Commission “to adopt additional rules to accomplish the program access statutory objectives ‘should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming.’”); *Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20300 (1996)(“*Third Report and Order*”)(Section 628(b) is “clear repository of Commission jurisdiction” to address new obstacles and by entitling section “Minimum Contents of Regulations,” Congress gave Commission authority to adopt additional rules that will advance the purposes of Section 628; “it did not limit the Commission to adopting rules only as set forth in that statutory provision”). The *Second Report and Order* and *Third Report and Order* were consolidated on appeal to the Fifth Circuit and affirmed in part, reversed in part, and remanded, on other grounds. See *City of Dallas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999).

<sup>15</sup> Comments of Comcast Corp. at 8.

<sup>16</sup> *MDU Exclusivity Report and Order*, 22 FCC Rcd 20246-247 (Section 628(b) authorizes rule that will prohibit the continuation and proliferation of an anticompetitive cable practice that has erected a barrier to the provision of competitive video service).

exclusive dealing arrangements and discriminatory practices involving terrestrially-delivered programming the purpose or effect of which is to hinder significantly or prevent any MVPD's ability to provide satellite programming to its subscribers or consumers.<sup>17</sup>

Thus the legislative history relied on by Comcast, and discussed by the Commission in the *2002 Sunset Extension Order* to the effect that Congress' use of the term "satellite cable programming" in Section 628(c)(2) reflects Congress' intent to limit the scope of the provision is simply besides the point.<sup>18</sup> As discussed above, Section 628(b) alone provides a solid basis for the Commission to adopt regulations prohibiting conduct that does not involve satellite-delivered programming. In any event, Comcast's argument that "Congress made a deliberate choice to exempt terrestrially-delivered cable-affiliated programming from the program access rules" [in using the term "satellite cable programming" from the House bill, when the Senate version of the bill would have applied the prohibition to all cable-affiliated programming] is simply nonsense.<sup>19</sup>

The term "satellite cable programming" was a term already defined in Section 705 of the Communications Act<sup>20</sup> (as opposed to the undefined term "national and regional cable programmers" used in the Senate bill), and as AT&T persuasively notes in its comments, "the language in Section 628 reflects Congress's understanding about the nature of the delivery mechanism typically used by cable programmers at the time of its enactment."<sup>21</sup> There was no reason for Congress to consider terrestrial delivery in 1992; therefore, no meaning can be

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<sup>17</sup> See Comments of CA2C at 14, 16-17 (filed Jan. 4, 2008).

<sup>18</sup> See Comments of Comcast Corp. at 7; *2002 Sunset Extension Order*, 17 FCC Rcd at 12158.

<sup>19</sup> Comments of Comcast Corp. at 7.

<sup>20</sup> 47 U.S.C. § 605.

<sup>21</sup> Comments of AT&T at 5-6 (filed Jan. 4, 2008).

ascribed to its omission.<sup>22</sup> Moreover, the legislative history demonstrates clearly Congress's concerns with the pernicious effects of incumbent control over video programming, and its desire to equip the Commission with the tools necessary to break the "stranglehold" that such control conferred on incumbents over their competition.<sup>23</sup>

In the face of this legislative history, and the fact that there was no reason for Congress to mention terrestrial delivery in 1992, it simply cannot be said that Congress intended to exclude terrestrial delivered programming from the reach of the Commission's jurisdiction. To the contrary, given the significant evils with respect to vertically-integrated programming identified by Congress that it was seeking to remedy, the Commission, as the relevant expert agency, has clear authority to take similar action with respect to cable-affiliated terrestrially-delivered programming, as it can with respect to satellite-delivered programming.<sup>24</sup>

In addition, contrary to the assertions of Comcast, Cablevision and NCTA, Section 706(a) of the Telecommunications Act of 1996 also informs the Commission's authority to act to close the terrestrial loophole under Section 628.<sup>25</sup> Section 706(a) requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience and,

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<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 6-9; *see also* 138 Cong. Rec. H6540 (daily ed. July 23, 1992)(Rep. Eckart)(cable operators "know that if they maintain their stranglehold on this programming, they can shut down competition – even the deep pockets of the telephone companies for a decade or more."); 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (statement of Rep. Tauzin)("[My] amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs. In effect, this bill says to the cable industry, 'You have to stop what you have been doing, and that is killing off your competition by denying it products.' . . . Programming is the key. . . . Without programming, competitors of cable are . . . stymied . . . It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, 'You cannot refuse to deal anymore.'").

<sup>24</sup> *See* Comments of AT&T at 6-7.

<sup>25</sup> *See* Comments of NCTA at 13-14; Comments of Cablevision Sys. Corp. at 16-17; Comments of Comcast Corp. at 12-13 (each citing *Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and NPRM, 13 FCC Rcd 24011, 24044-24046 (1998).

and necessity, . . . regulatory forbearance, measures that promote competition in local telecommunications markets, or other regulating methods that remove barriers to infrastructure investment.” As the DC Circuit recently recognized, Section 706 provides the Commission with an “overarching direction:” to “*encourage the deployment* on a reasonable and timely basis of advanced telecommunications capability to all Americans” utilizing regulatory forbearance, measures to promote competition, or other regulating methods.<sup>26</sup> The courts have recognized the “forward looking approach” of Section 706,<sup>27</sup> and under the section’s overarching direction, the Commission “has the authority to consider the goals of Section 706 when formulating regulations under the Act.”<sup>28</sup>

The D.C. Circuit has, in fact held, that the precise interplay between Section 706 and other provisions of the Act is not self evident from the text, and is “precisely the type of ambiguity entrusted to reasonable agency construction.”<sup>29</sup> Where, as here, the Communications Act grants the Commission discretion to act, Section 706 should inform the Commission’s use of that discretion. In this regard, the Commission recently concluded in the *Local Franchising Report and Order*, that its authority to adopt local franchising rules under Section 621 “is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment.”<sup>30</sup> There, as here, specific provisions of the

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<sup>26</sup> *Earthlink, Inc. v. Federal Communications Commission*, 462 F.3d 1, 4-5 (D.C. Cir. 2006).

<sup>27</sup> *Id.* at 8

<sup>28</sup> See, e.g., *Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and FNPRM, 22 FCC Rcd 5101, 5132 (2007) (“*Local Franchising Report and Order*”)

<sup>29</sup> *Earthlink*, 462 F.3d at 8.

<sup>30</sup> *Local Franchising Report and Order*, 22 FCC Rcd at 5132.

Communications Act provide the Commission with a jurisdictional basis to act, and Section 706 helps direct the Commission *how* to act.

The Commission has repeatedly found that broadband deployment is “linked intrinsically” to the ability to offer a viable video service.<sup>31</sup> As the Commission has found on numerous occasions and in numerous contexts, there is no question that refusals to deal and other discrimination involving cable-affiliated terrestrial programming, “has had a material adverse impact on competition in the video distribution market.”<sup>32</sup> Rather than the absence “of even a tenuous connection” between the availability of affiliated terrestrially-delivered programming and broadband deployment, as asserted by Comcast,<sup>33</sup> the Commission, applying its predictive judgment using a provision which requires a “forward looking approach,” has ample evidence of concrete impacts on video distribution, and hence broadband deployment, which provide compelling grounds for invoking the mandates of Section 706 to support its elimination of the terrestrial loophole.

**B. The First Amendment Neither Bars Adoption of a Rule Closing the Terrestrial Loophole nor Mandates a “More Granular” Market-by-Market Test for Programmers to Obtain Authorization to Enter into Exclusive Contracts.**

NCTA argues that program access requirements implicate the First Amendment rights of programmers because they dictate to whom programming must be sold and the terms and

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<sup>31</sup> *Id.* (“The record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”)

<sup>32</sup> *2007 Sunset Extension Order*, 22 FCC Rcd at 17817 and cases cited therein.

<sup>33</sup> Comments of Comcast Corp. at 12.

conditions under which it would be sold.<sup>34</sup> Acknowledging that this argument has already been rejected by the courts,<sup>35</sup> NCTA nonetheless argues that any new rules adopted by the Commission would be subject to renewed scrutiny in light of the substantial competition that currently exists in the marketplace.<sup>36</sup>

As Time Warner notes in its comments (albeit in the context of proposed bundling and tying rules) and as the court noted in *Time Warner*, the program access rules would be subject to “intermediate scrutiny” as they are “content-neutral on their face” and are “not structured in a manner that raises suspicions that their objective was, in fact, the suppression of certain ideas.”<sup>37</sup> Under the intermediate scrutiny test, the court asks whether the provision “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and, if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>38</sup>

In *Time Warner v. FCC*, the D.C. Circuit concluded that the program access provision itself, Section 628, met the intermediate scrutiny test. The Commission again addressed and rejected these same First Amendment arguments in the context of its initial extension of the exclusivity prohibition in 2002, and more recently in the further extension of the exclusivity prohibition adopted late last year.<sup>39</sup> In that latest order, the Commission concluded that the further extension of the exclusivity prohibition satisfied the intermediate scrutiny test based on

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<sup>34</sup> Comments of NCTA at 11.

<sup>35</sup> See *id.*, citing, *Time Warner Entertainment, L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

<sup>36</sup> Comments of NCTA at 11.

<sup>37</sup> *Time Warner v. FCC*, 93 F.3d at 977-78 (citing *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2468(1994).

<sup>38</sup> *Turner*, 114 S. Ct 2469.

<sup>39</sup> See 2002 *Sunset Extension Order*, 17 FCC Rcd at 12156; 2007 *Sunset Extension Order*, 22 FCC Rcd at 17837-838.

the market conditions and the incentives of vertically integrated programmers. Of course, market conditions are no different today than just four months later.

Surely aware of this, Cablevision now tries a slightly different tack – arguing that the First Amendment requires application of the exclusivity ban with more precision, and must establish a more “granular” test that enables cable operators to seek relief from the exclusivity ban in competitive markets.<sup>40</sup> But, at its heart, this argument is simply another version of cable’s prior “overinclusiveness/underinclusiveness” arguments. In the last proceeding, cable argued that the ban was overinclusive in that it applied to programming to which it should not apply, and underinclusive in that it does not apply to “must have” non-affiliated programming.<sup>41</sup> Here, cable, dusts off the same argument in slightly different form, asserting that the ban applies in *markets* where it should not apply.

The Commission’s answer should be the same here as it was there. Nothing in the provision requires the Commission to compare markets against other markets, just as nothing required it to specify what is and what is not “must-have” programming. Moreover, the exclusivity prohibition is not absolute, and that cable-affiliated programmers may seek Commission authorization to enter into exclusive agreements in circumstances that meet the criteria set forth in Section 628(c)(2)(D).<sup>42</sup> While the exclusivity provision creates a presumption against the use of exclusive contracts given the inherent potential for competitive harm, it also provides a path for cable operators and vertically integrated programmers to obtain Commission authorization for a particular exclusive where the Commission determines the

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<sup>40</sup> Comments of Cablevision Sys. Corp. at 5

<sup>41</sup> *2007 Sunset Extension Order*, 22 FCC Rcd at 17838. (arguing that the ban is both overexclusive (in that it applies to programming that is arguably not essential to the viability of video competition) and underinclusive (in that it does not apply to “must-have” non-affiliated programming)).

<sup>42</sup> *Id.*

exclusivity arrangement is in the public interest, weighing a number of factors set forth Section 628(c)(4).<sup>43</sup> Thus, Section 628 already provides for a process to authorize particular exclusivity arrangements in circumstances where the proponents can make the required showing under Section 628, including the effect of such exclusive on competition in the MVPD market, attraction of capital investment, and diversity of programming in the market. This is more than sufficient “granularity”, to the extent such granularity is required for First Amendment purposes.

**III. PROPOSALS THAT WOULD BE TANTAMOUNT TO AN EARLY SUNSET OF THE EXCLUSIVITY PROHIBITION SHOULD BE REJECTED.**

The proposals by Comcast and Cablevision that would essentially be tantamount to an early sunset of the prohibition on exclusives should be rejected. As discussed above, and discussed in CA2C’s initial comments, Section 628 already provides for a process to authorize particular exclusivity arrangements in circumstances where the proponents can make the required showing under Section 628, including the effect of such exclusive on competition in the MVPD market, attraction of capital investment, and diversity of programming in the market. Hence no more “granularity” is required from that already provided in the statute and the Commission’s rules, including, as discussed above, to address any purported First Amendment issues.

Cablevision has advocated that the Commission should create rules that would allow for the elimination of the prohibition on exclusives when a market faces “durable and substantial competition from other video providers -- DBS and either AT&T or Verizon -- in a Designated

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<sup>43</sup> Comments of CA2C at 24.

Market Area (DMA)”<sup>44</sup> It should be noted that Cablevision and Comcast have already indicated how they might define “durable and sustainable” in comments filed in the 07-29 proceeding. In that proceeding Comcast recommended the following rules to determine that the prohibitions on exclusives should not apply for competition that has the following conditions:

1. Any company with over 10 million subs.<sup>45</sup> (DIRECTV and Echostar)
2. Any company with over \$100 billion capitalization.<sup>46</sup> (AT&T and Verizon)
3. Any company with 5 years of operation.<sup>47</sup> (RCN, Knology and most other BSPs).

In other words, Comcast proposes that the exclusivity prohibition should have no application to any significant competitor Comcast faces.

Cablevision has recommended the following:

1. No exclusivity prohibition on smaller MVPDs<sup>48</sup> (presumably, the prohibition would not apply to Cablevision as a smaller MVPD.)
2. No exclusivity prohibition if the incumbent is facing both DBS and telephone company-based competition<sup>49</sup> (as soon as a telephone company such as Verizon, AT&T or any other, starts any level of service the rules no longer apply, even if they have just begun service to a limited number of customers).

Like Comcast’s proposal, Cablevision’s original proposal would eliminate application to any significant competitor Cablevision might face, again making sure the rules are immediately meaningless. The Commission has already recognized and rejected these proposals for what they are: self-serving attempts to dilute all potential benefit that the rules offer.

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<sup>44</sup> Comments of Cablevision Sys. Corp., MB Docket No. 07-29, at 2 (filed Apr. 2, 2007).

<sup>45</sup> Comments of Comcast Corp., MB Docket No. 07-29 at 26 (filed Apr. 2007).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Comments of Cablevision Sys. Corp. at 31.

<sup>49</sup> *Id.* at 32.

Comcast has now proposed that the “50/15” test for effective competition in Section 623(l)(1)(B),<sup>50</sup> which frees cable operators from basic tier rate regulation by local franchising authorities, be used to establish when the level of competition in a local MVPD market justifies sunset in that market of the exclusivity prohibition in Section 628(c)(2)(D). Of course, the 50/15 rule was essentially a political compromise related to local rate regulation, and there has been no showing that the test, in fact, measures the level of competition in a local market. On its face, it is inapplicable to the exclusivity ban.

Indeed, it is hard to imagine that cable’s proposed use of a 15 percent market penetration is anything other than yet another thinly disguised effort to eliminate the exclusivity prohibition in the thousands of markets across the country. DBS operators pass a large majority of the market and have generally achieved a combined market share in excess of 15 percent. Therefore adopting this rule would immediately sunset the prohibition on exclusives in markets across the country when the Commission had just determined that the rules were needed to preserve and protect competition for a minimum of five more years.

Even if a more realistic market test were proposed, moreover, it is precisely the markets that currently enjoy competition from two wireline providers as well as those that are on the cusp of a second provider entering, where vertically integrated cable operators have the greatest incentive to use their control over programming to inhibit competitive entry. As discussed below, there is no question that competitive penetration has been impaired where competitive MVPDs have been denied access to vertically-integrated terrestrially-delivered programming. It would be ironic if the Commission adopted rules providing for an early sunset of the exclusivity prohibition in the very markets where vertically integrated cable operators can have the greatest

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<sup>50</sup> 47 U.S.C. § 543(l)(1)(B).

adverse impact on nascent competition through the exercise of vertical foreclosure strategies, and for this reason as well, Comcast's proposed 50/15 rule should be rejected.

Growth in competition over the next five years is expected to primarily come from additional wireline competition. Development of this competition will require major capital investments over a minimum of the next five years and there are no compelling reasons to consider early sunset of the prohibitions on exclusive contracts before the next five year review. The current exclusives are also required to preserve the DBS and other competition, as well as diversity of programming, that has developed since the provisions were enacted in 1992.

**IV. COMPETITIVE PENETRATION HAS BEEN IMPAIRED WHERE ACCESS TO TERRESTRIALLY-DELIVERED CONTENT HAS BEEN DENIED.**

Cablevision further asserts that "DIRECTV and Echostar (Dish Network) have demonstrated clearly that access to terrestrially-delivered cable-affiliated programming is not necessary to offer a viable video service."<sup>51</sup> This argument does not relate to the competitive standard of the statute and there is clear evidence of harm from the withholding of terrestrially-delivered content. The legal standard is not the "ability to offer a viable video service." Section 628(b) does not say that unfair practices can be barred only if they prevent competitors from offering a viable service. It says instead that unfair practices must be barred if they "hinder significantly" a competitor's ability to provide satellite cable programming to its customers.

The market experience of DIRECTV and Dish Network gives the Commission ample evidence of the negative effect of withholding cable-affiliated terrestrially-delivered programming and its measurable harm to competition. This evidence contributed to the Commission's decision to impose conditions on the acquisition of Adelphia by Comcast and

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<sup>51</sup> Comments of Cablevision Sys. Corp. at 17.

Time Warner. In the *2007 Sunset Extension Order*, the Commission cited numerous instances in which terrestrially-delivered programming, including CSN Philly and Channel 4 San Diego, has been withheld.<sup>52</sup> The Commission specifically found that there is “factual evidence that cable operators have withheld this programming from competitors and, in two instances – in San Diego and Philadelphia – there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market.”<sup>53</sup>

Indeed, with respect to these two channels, the Commission explicitly found that the effect of withholding was to reduce DBS subscribership by more than 40 percent in Philadelphia and 33 percent in San Diego.<sup>54</sup> The Commission has thus determined that “withholding can have a significant impact on subscribership to the rival MVPDs” and that this, “in turn, predictably harm[s] competition and diversity in the distribution of video programming, to the detriment of consumers.”<sup>55</sup> This is more than sufficient for the Commission to conclude that, today, unfair practices involving terrestrially-delivered programming have the “effect” of hindering competition in the delivery of satellite cable programming. And it is more than sufficient for the Commission to, once and for all, close the terrestrial loophole. Competition – DBS or Wireline –

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<sup>52</sup> *2007 Sunset Extension Order*, 22 FCC Rcd at 17823-826 (also referencing, overflow sports programming in New York, RSNs affiliated with Cablevision in New York and New England, HD feeds of RSNs affiliated with Cablevision, NECN, PBS Kids Sprout, iN DEMAND, CN8, and channels sought by NRTC).

<sup>53</sup> *Id.* at 17817-818.

<sup>54</sup> *Id.* see also *id.*, App. B, at 17876 (“The regression equation contains dummy variables for the three markets, Philadelphia, San Diego, and Charlotte, in which local RSNs were not made available to DBS. The estimated coefficients on these dummy variables are negative in all three cases and statistically significant in the case of Philadelphia and San Diego. The magnitude of the coefficients indicates that in Philadelphia, DBS penetration is 40.5% lower than it would be if the local RSN were available to DBS. The corresponding figure for San Diego is 33.3%.”); see also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd. 8203, 8270-71 (2006) (same).

<sup>55</sup> *2007 Sunset Extension Order*, 22 FCC Rcd at 17818-819.

will be similarly harmed in any market where Cable-affiliated terrestrially-delivered programming is denied to competitive MVPDs.

While some of the immediate opportunities to deny access to terrestrially-delivered programming that Comcast and Time Warner might otherwise pursue have been constrained for the time being by the Adelphia conditions,<sup>56</sup> the general opportunity and incentive to pursue anti-competitive strategies similar to those used in San Diego and Philadelphia are increased by the growth of regional clusters. The Commission has fully recognized this condition as it related to the decision to extend the current prohibitions on cable-affiliated satellite-delivered exclusives. Even though cable's overall market share has diminished, regional clustering and cable exclusives mean that cable operators possess even greater market power in the relevant geographic markets they serve.

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<sup>56</sup> The Adelphia conditions expire in July 2012.

**CONCLUSION**

WHEREFORE, the Coalition for Competitive Access to Content urges the Commission close the terrestrial loophole and apply the program access provisions to cable-affiliated terrestrially-delivered programming. We further recommend that the Commission not provide for any early sunset of these proven measures that enhance competition and broadband deployment.

Respectfully submitted for:

**The Coalition for Competitive Access to Content**

By: /s/

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Dated: February 12, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of February, 2008 a copy of the foregoing Reply Comments of The Coalition for Competitive Access to Content were served via electronic mail on each of the persons listed on the attached service list.

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/s/  
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